SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA
CASE NO:SC03-1610

RAYMOND JAMES FINANCIAL SERVICES, INC., a Florida corporation and RICHARD VANDENBERG,	:
Petitioners,	:
vs.	:
STEVEN W. SALDUKAS and STESAL INVESTMENTS, LLC.,	:
Respondents,	:

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEALS
LAKELAND, FLORIDA

PETITIONERS' BRIEF ON THE MERITS

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JURISDICTION

In its briefing order, this Court required the parties to submit merits' briefs, but postponed accepting jurisdiction. This Court has discretionary jurisdiction to review decisions of the district courts of appeal that expressly and directly conflict with a decision of this Court or another district court of appeal on the same question of law. See Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). In Raymond James Financial Services, Inc. v. Saldukas, 851 So. 2d 853, 858 (Fla. 2d DCA 2003), the Second District below held that a party alleging that the opposing party has waived its right to arbitrate need not also show prejudice. The Second District's decision -- which does not require a showing of prejudice -- expressly and directly conflicts with the rule of law announced by the First and Third Districts, which require prejudice. Benedict v. Pensacola Motor Sales, Inc., 846 So. 2d 1238, 1240-1241 (Fla. 1st DCA 2003); Lane v. Sarfati, 691 So. 2d 5 (Fla. 3d DCA 1997).

The citizens of this State are entitled to the same rule of law, no matter where they reside or in what district they litigate. As it now stands, a party in Tampa receives a different result on identical facts as a party in Miami. This Court should exercise its discretion to resolve this dispute and end this discrepancy.

Once this Court accepts jurisdiction over this case, this Court has jurisdiction over all issues on appeal. See, e.g., Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911 (Fla. 1995) (having accepted jurisdiction over a question certified to be of great public importance, the court may review the district court's decision for any error); Jacobson v. State, 476 So. 2d 1282, 1285 (Fla. 1985) (having accepted jurisdiction because of facial conflict between two decisions from district courts of appeal, the court may dispose of the case on grounds other than the conflict grounds).

STATEMENT OF THE CASE AND THE FACTS

On February 20, 2002, Plaintiffs, Steven W. Saldukas ("Saldukas") and Stesal Investments, LLC ("the LCC"), sent a letter to the director of arbitration for the New York Stock Exchange ("NYSE"), seeking to arbitrate claims alleging unsuitable investments with Raymond James Financial Services, Inc. (A1:Ex1)[1] Plaintiffs partially based their claims upon the actions of Richard VandenBerg, a broker Raymond James had employed. (A1:Ex1:4-6) However, Plaintiffs did not demand arbitration with VandenBerg and did not seek relief against him in the arbitration. (A1:Ex1:1)

Raymond James moved to dismiss Plaintiffs' claim before the NYSE. (A1:Ex3) First, Raymond James noted that none of the claims set forth in the arbitration demand related to Saldukas' IRA account or accounts, for which he had signed a customer agreement with an arbitration clause. (A1:Ex3:1) In addition, Raymond James' counsel observed that although the Stesal Investments Limited Partnership had a customer relationship with Raymond James, the LLC did not. (A1:Ex3:1) Raymond James'

[1/] All record references are to the appendix filed with the briefing in the Second District below. The cite will first reference the relevant tab number, then the page number from that tab item. If referring to an exhibit to a tab item, that exhibit will also be referenced, then the page number of that exhibit.

counsel sent a copy of this dismissal motion to Plaintiffs' counsel and threatened to enjoin the arbitration if the NYSE did not grant it. (A1:Ex4) Rather than respond to this dismissal motion, almost four months later, Saldukas and the LLC sued Raymond James and VandenBerg in circuit court, raising the same theories and seeking the same damages as in the NYSE arbitration proceeding. (A1:1)

After receiving this lawsuit, Raymond James and VandenBerg's counsel wrote to Plaintiffs' counsel, stating:

> On another note, I was candidly surprised that you filed the lawsuit. As you are fully aware, by letter dated March 15, 2002, I filed with the New York Stock Exchange a motion to dismiss on behalf on Raymond James. I did so because Raymond James never had an account relationship with Stesal Investments, LLC. My clients fully admit that Stesal Investments Ltd. Partnership did have an account with Raymond James, and therefore Stesal Investments Ltd. Partnership would have every right to pursue an arbitration claim against my clients.
>
> ...
>
> Had there been an actual name change of Stesal Investments Ltd. Partnership to Stesal Investments, LLC, I would have expected that you simply would have filed with the New York Stock Exchange a response to my motion to dismiss, clarifying and reiterating that Stesal Investments Ltd. Partnership simply changed its name to Stesal Investments, LLC. ... I also would have expected that you would have responded to my letter to you dated March 15, 2002.

...

> Please immediately provide me with an explanation as to how, when and where this alleged merger between Stesal Investments Ltd. partnership and Stesal Investments, LLC occurred. ... If you do provide me an explanation as to the alleged merger which appears legitimate and which is supported by documents, then Raymond James has no objection to the New York Stock Exchange arbitration going forward. (A8:ExD)

Once Plaintiffs' counsel received this letter, he spoke to Raymond James' counsel, who memorialized this conversation in a letter stating:

> As we discussed earlier today, Raymond James Financial Services, Inc. and Richard VandenBerg are perfectly willing to arbitrate with Stesal Investments Ltd. Partnership. My clients are not willing to arbitrate with Stesal Investments, LLC, unless you provide us with documentation and information to support your allegation that Stesal Investments Ltd. Partnership merged into Stesal Investments, LLC. ... Raymond James and Mr. VandenBerg have no problem arbitrating, but they are only willing to arbitrate with the proper party. ... You mentioned that you would speak with your client and then get back to me regarding my proposal to arbitrate. Please contact me as soon as possible to discuss this matter. (A8:ExE)

Despite these requests, Plaintiffs' counsel never provided such documentation. (A8:4) Raymond James and VandenBerg thus moved to dismiss Plaintiffs' complaint on procedural grounds. (A3:1) In their motion to dismiss, Raymond James stipulated to

its willingness to arbitrate and again offered:

> Stesal Investments Ltd. Partnership has every right to pursue an arbitration claim against Raymond James, and Raymond James is perfectly willing to arbitrate such a claim. Accordingly, the filing of this motion to dismiss should not be construed as a waiver on the part of Raymond James or VandenBerg to move to compel arbitration of any claim legitimately advanced by or on behalf of Stesal Investments Ltd. Partnership. (A3:1:8)
>
> . . .
>
> Defendants have always been willing to arbitrate but only with the proper party. Raymond James moved to dismiss the arbitration claim because the claim was being asserted on behalf of an entity with which it has no contractual relationship and no agreement to arbitrate. If there was a legitimate merger, notwithstanding the public records to the contrary, then the claim should be arbitrated.

(A3:1:10) Raymond James and VandenBerg filed a memorandum supporting their motion to dismiss. (A6:1) In it, they continued to challenge the procedural posture of the lawsuit. (A6:1-7) Not once did they attack the merits of Plaintiffs' claims. (A6:1-7)

Plaintiffs never withdrew their NYSE demand to arbitrate and the NYSE arbitration proceeding continued. (A8:ExF) On October 11, 2002, the NYSE informed the parties that mediation and the arbitrator selection process were underway. (A8:ExF) Raymond James responded positively to this letter, and agreed to a

specific mediator. (A8:ExG) Raymond James also expressed its preference for the procedure to appointment arbitrators. (A8:ExG)

Several months after a hearing on the motion to dismiss, and while the NYSE proceedings continued without any objection by Plaintiffs, the trial court denied the motion to dismiss, and required Raymond James and VandenBerg to respond to the complaint. (A14:1) Because one of Plaintiffs' memoranda had revealed the LLC was a limited liability company registered in the territory of the Island of Nevis, Raymond James and VandenBerg assumed the allegations regarding the merger were accurate. (A8:5) Raymond James and VandenBerg thus moved to compel arbitration and stay litigation. (A8:1) In their motion, they pointed to the pending arbitration before the NYSE. (A8:5) Reciting the above background, Raymond James explained that it had never objected to arbitrating claims with its actual customers. (A8:2-6)

Not only did Raymond James and VandenBerg move to compel arbitration, the actual arbitration continued. (A11:2, 6-7) The NYSE appointed a panel of arbitrators. (A11:7) The NYSE also ordered the parties to mediation, which was scheduled for February 21, 2003. (A11:7) Raymond James served its discovery requests in the arbitration. (A11:7)

On December 6, 2002, the parties held a telephonic hearing before the NYSE. (A9:ExA) During this hearing, the parties agreed to the future procedure on Plaintiffs' arbitration demand. (A9:ExA) The NYSE sent a letter to counsel for the parties, confirming the matters resolved at this hearing and providing a schedule for the arbitration. (A9:ExA) The letter required the parties to submit all discovery requests by February 28, 2003, and to respond to such requests by March 28, 2003. (A9:ExA) The NYSE reserved ruling on Raymond James' dismissal motion to allow Raymond James discovery regarding the alleged merger between the Partnership and LLC. (A9:ExA) ***Finally, and with agreement of all parties, the NYSE scheduled the arbitration for June 23-27, 2003.*** (A9:ExA) Raymond James then served its alternative answer and defenses in the NYSE arbitration proceeding. (A11:7)

After the parties received the scheduling order from the NYSE, they filed memorandums of law supporting or opposing the motion to compel arbitration. (A9:1; A10:1; A11:1) In one of its memorandum, Raymond James and VandenBerg commented that the parties were in fact proceeding with the NYSE arbitration. (A11:2) Though Plaintiffs never denied this assertion, they nonetheless argued that Raymond James and VandenBerg had waived the right to arbitrate by acting inconsistent with that right.

(A10:8) According to Plaintiffs, Raymond James had engaged in a "bad faith refusal to arbitrate." (A10:4)

A hearing was held on the motion to compel and stay. (A16:1-35) At that hearing, Raymond James and VandenBerg's counsel observed that the motion to compel arbitration was essentially moot because the parties were proceeding with arbitration (A16:7) Nonetheless, the trial court denied Raymond James and VandenBerg's motion to compel and stay. (A14) The order does not explain the basis for the court's ruling. (A14) Raymond James appealed that order to the Second District. Raymond James Financial Services, Inc. v. Saldukas, 851 So. 2d 853 (Fla. 2d DCA 2003).

The Second District affirmed on the basis that Raymond James and VandenBerg acted inconsistent with their right to arbitrate. Id. at 856. The court found the evidence sufficient to support a finding that Raymond James and VandenBerg waived their right to arbitrate these claims. Id. The court specifically focused upon Raymond James's conduct before the NYSE, when it challenged the jurisdiction of the NYSE. Id. Relying upon Donald & Co. Securities, Inc. v. Mid Florida Community Services, Inc., 620 So.2d 192 (Fla. 2d DCA 1993), the court also held that Plaintiffs were not required to establish prejudice for the trial court to find a waiver. Saldukas, 851 So. 2d at 856. The

court commented that the Fourth and Fifth Districts had concurred that showing prejudice was unnecessary to waive the right to arbitrate. Id. at 857. However, the court recognized that the Third District certified conflict with Donald & Co. Id. The Second District disagreed with the Third District, reasoning that there was no binding federal precedent on the issue and that the rationale behind holding that prejudice is not a required element of waiver was more persuasive. Id. at 857-858.

In a concurring opinion, Judge Canady agreed that the court was bound by its prior precedent, but expressed concern whether the court would adopt the Donald & Co. rule if the issue were a matter of first impression before it. Id. at 859. Judge Canady noted that the weight of authority required prejudice to waive the right to arbitrate. Id. Judge Canady lamented that allowing a party to an arbitration agreement to avoid arbitration due to the adverse party's non-prejudicial conduct might unnecessarily undermine the arbitration process. Id.

This timely appeal followed.

SUMMARY OF THE ARGUMENT

The Second District's decision conflicts with the public policy favoring arbitration. The court created this conflict when it concluded that Raymond James' actions in the NYSE arbitration forum were inconsistent with the right to arbitrate, and thus constituted a waiver of that right.

No case has ever found that a party who solely disputes his duty to arbitrate until he has adequate documentation to support the request is estopped from demanding arbitration. The concept of waiver emanates from acts a party takes that are inconsistent with the right to arbitrate. For instance, Florida courts have found that a party who engages in substantial litigation acts inconsistent with his right to arbitrate. This rule makes sense. Parties agree to arbitrate to avoid the expense and demands of the judicial system. When a party proceeds to litigate, but later demands arbitration, the act of proceeding through the judicial system is a clear waiver of the right to arbitrate.

None of that reasoning applies here. The acts the Second District found inconsistent with the right to arbitrate occurred in the arbitral forum. Moreover, in the arbitral forum, Raymond James merely questioned *via* a motion to dismiss the parties' duty to arbitrate. When Raymond James asked the NYSE to decide

whether it had jurisdiction, it was doing exactly what the parties agreed to do, resolving the dispute outside the judicial system. This Court should hold that a party does not waive his or her right to arbitrate merely because it questioned -- in the arbitrable forum -- the jurisdiction of the arbitrators to resolve the dispute.

Likewise, this Court should adopt a rule of law that requires proof of prejudice before the court will find a waiver of the right to arbitrate. The majority of federal courts require prejudice for waiver to occur, which supports the presumption favoring arbitration. This Court has noted that the federal and Florida arbitration act should be construed consistently. The Second District's decision that prejudice need not be shown creates an untenable conflict between state and federal law and undermines public policy favoring arbitration.

STANDARD OF REVIEW

The question of whether a party's pretrial conduct amounts to waiver of arbitration is purely a legal one. Ivax Corp. v. B. Braun of Am., 286 F.3d 1309 (11th Cir. 2002). Because this appeal involves a pure question of law, this Court reviews this matter *de novo*. Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000).

ARGUMENT

I. RAYMOND JAMES AND VANDENBERG'S CONDUCT WAS CONSISTENT WITH THEIR RIGHT TO ARBITRATE GIVEN THAT RAYMOND JAMES AND VANDENBERG ACKNOWLEDGED THEIR DUTY TO ARBITRATE WITH THOSE PERSONS AND/OR ENTITIES WITH WHOM THEY HAD A CONTRACTUAL AGREEMENT TO ARBITRATE, AND NEVER ACTIVELY LITIGATED THE MERITS OF PLAINTIFFS' CLAIMS.

In its opinion, the Second District focused on Raymond James' position in the NYSE proceeding that the existing documents did not show it had a duty to arbitrate. From this conduct, the court concluded Raymond James acted inconsistent with its right to arbitrate.[2] The court overlooked the undisputed fact that from the time Plaintiffs filed their NYSE arbitration demand, Raymond James recognized its duty to arbitrate. Raymond James never denied its obligation to arbitrate; rather, it agreed to arbitrate if there was an agreement to arbitrate.

Although the Partnership had an account agreement with Raymond James, the LLC, not the Partnership, demanded

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[2/] VandenBerg did not take any actions whatsoever in the NYSE proceedings because he was never a party to it. Even so, the Second District refused to address whether VandenBerg acted inconsistent with the right to arbitrate because, it concluded, this issue had been waived. The Second District's holding on this point is puzzling. VandenBerg was a party to the motion to compel arbitration and stay the litigation, and argued that he did not take acts inconsistent with the right to arbitrate. This issue was properly preserved for appeal.

arbitration. While the LLC alleged that it was formerly known as the Partnership, Raymond James simply asked for documents to prove this merger before it agreed to arbitrate. In document after document, letter after letter, Raymond James persistently requested Plaintiffs' counsel to provide this proof so that Raymond James could determine the validity of the LLC's demand for arbitration. Plaintiffs' counsel never responded to any of these requests.

The Second District presumably found these facts irrelevant to the waiver determination, but was instead swayed by the fact that Raymond James sought to have the arbitration proceeding dismissed and threatened to file a lawsuit. In its opinion, the court stated:

> If Raymond James was truly trying to preserve this right, it could have raised the standing issue in its answer to the arbitration claim and asked the arbitration panel to determine standing before proceeding to the merits of the case. Instead, Raymond James actively sought to avoid having the arbitrators consider either the standing issue or the merits of the case.

The Second District's analysis is nothing short of startling. The court has held that by filing a motion to dismiss (rather than an answer) in the arbitration, and asking the NYSE to consider whether the matter was arbitrable, Raymond James somehow acted inconsistent with its right to arbitrate. There

is simply no authority to support the Second District's conclusion that asking the arbitration forum to resolve arbitrability issues constitutes a waiver of that right.

Nor does Raymond James' threat to file a lawsuit equate to waiver. Threats to file a lawsuit are not acts inconsistent with the right to arbitrate. Executive Life Insurance Co. v. John Hammer & Assoc., 569 So. 2d 855 (Fla. 2d DCA 1990) *citing* Mitlon Schwartz & Assoc., Architects v. Magness Corp., 368 F. Supp. 749 (D.Del. 1974). Equally important, these alleged "threats" must be taken in the overall context of the dispute. Raymond James agreed that it would arbitrate if the proper documentation was produced.

Despite the Second District's statement that Raymond James "unequivocally refused to arbitrate the claim with Saldukas and Stesal LLC," Raymond James did not file a lawsuit to enjoin the arbitration, but stated it would arbitrate with both parties if the proper documents were produced. Indeed, the only party that ignored the duty to arbitrate was the Plaintiffs, who filed a lawsuit when the arbitration was pending.

Case law certainly supports Raymond James and VandenBerg's position that their acts were consistent with the right to arbitrate. To prove waiver, Plaintiffs must show that Raymond James and VandenBerg actively participated in litigation or took

acts inconsistent with the right to arbitrate. Klosters Rederi A/S v. Arison Shipping Co., 280 So. 2d 678, 681 (Fla. 1973)("a party's contract right may be waived by actively participating in a lawsuit or taking action inconsistent with that right."). There is simply no case law to support the Second District's conclusion that asking the arbitrators to resolve the arbitrability issue is an act inconsistent with the right to arbitrate. To the contrary, the United States Supreme Court has endorsed arbitrators resolving their own jurisdiction when the parties have empowered them to do so. First Options v. Kaplan, 514 U.S. 938, 943 (1995).

Besides, while the Second District recognized that any doubts concerning whether a waiver has occurred should be resolved in favor of arbitration, Raymond James Fin. Servs. v. Saldukas, 851 So. 2d 853 (Fla. 2d DCA 2003) *citing* Prudential Sec., Inc. v. Katz, 807 So. 2d 173, 174 (Fla. 3d DCA 2002), it overlooked the correlating principle that the waiver determination should be made viewing the totality of the circumstances. Ivax Corp. v. B. Braun of Am., 286 F.3d 1309 (11th Cir. 2002). Here, the totality of the circumstances does not support a waiver. From the inception of the NYSE arbitration proceeding, Raymond James agreed it had a duty to arbitrate, its only limitation was that it requested documents

to show that the party requesting arbitration had the right to do so. When these acts are viewed with all of its other acts, Raymond James' actions are not inconsistent.

Nor did Raymond James and VandenBerg's acts fall within those cases that found waiver of the right to arbitrate based on active participation in the litigation process.[3] Summarizing the state of the law, the Fourth District recently stated in Miller & Solomon General Contractors, Inc. and Hartford Accident and Indemnity Company v Brennan's Glass Co., Inc., 824 So. 2d 288, 291 (Fla. 4th DCA 2002):

> Based upon these cases, it is clear that the prevailing view looks at the defendant's intention in responding. Is the defendant's response to attack the merits? If so, then waiver is acknowledged. If the defendant's response is not directed at the merits of the actual underlying claim, then waiver should not be inferred.

Raymond James and VandenBerg never litigated the merits of

[3/] See Morrell v. Wayne Frier Manufactured Home Ctr., 834 So. 2d 395 (Fla. 5th DCA 2003)(manufacturer and the buyer did not assert the right to arbitrate until the eve of trial, nearly a year after the complaint was served); Shoma Dev. Corp. v. Rodriguez, 730 So. 2d 838 (Fla. 3d DCA 1999)(appellant waived its right to compel arbitration under the parties' agreement because appellant actively participated in litigation for a seven-month period which prejudiced appellees; appellant's active participation resulted in legal fees and costs that could have been avoided); Pesut v. Prudential Sec., Inc., 722 So. 2d 833 (Fla. 2d DCA 1998)(appellee security company and appellee security dealer had waived their right to compel arbitration by answering, seeking discovery, and moving for summary judgment).

Plaintiffs' claims. Other than raising a procedural issue, Raymond James and VandenBerg only requested the circuit court to resolve Plaintiffs' duty to arbitrate. On much more active participation, courts have concluded that a party did ***not*** waive arbitration. Merrill Lynch Pierce Fenner & Smith, Inc. v. Adams, 791 So. 2d 25 (Fla. 2d DCA 2001)(appellees' involvement in discovery did not constitute sufficient record activity such that they waived their right to compel arbitration); Phillips v. General Accident Ins. Co. of Am., 685 So. 2d 27 (Fla. 3d DCA 1996)(plaintiff did not waive the right to arbitration by participating in discovery because his discovery requests were limited in scope and aimed at obtaining information relevant to the determination of whether the right to arbitration was present); Miami Dolphins, Ltd. v. Cowan, 601 So. 2d 301 (Fla. 3d DCA 1992)(lawsuit had been in progress for just over three months when the party raised the arbitration issue in response to a motion for summary judgment; party had by then answered and counterclaimed; no discovery of any consequence had occurred in the case).

In sum, Raymond James' actions before the NYSE are perfectly consistent with the right to arbitrate. In addition, Raymond James and VandenBerg did not actively litigate the merits of Plaintiffs' claims. The Second District's conclusion that holds

otherwise conflicts with the above decisions and should be quashed.

II. UNDER EITHER THE FEDERAL ARBITRATION ACT OR FLORIDA ARBITRATION CODE, A PARTY ASSERTING WAIVER OF THE RIGHT TO ARBITRATE SHOULD BE REQUIRED TO PROVE IT WAS PREJUDICED BY THE ACTS ALLEGEDLY INCONSISTENT WITH THE RIGHT TO ARBITRATE.

Florida district courts have long disagreed whether a party must show that acts inconsistent with the right to arbitrate prejudiced that party for there to be a waiver of the right to arbitrate under the Florida Arbitration Code. The Second, Fourth and Fifth Districts hold that prejudice need not be shown. Saldukas, 851 So. 2d at 856; Morrell v. Wayne Frier Manufactured Home Ctr., 834 So. 2d 395, 397 (Fla. 5th DCA 2003); Owens & Minor Med., Inc. v. Innovative Mktg. & Distrib. Servs., Inc., 711 So. 2d 176, 177 (Fla. 4th DCA 1998). The First and Third hold to the contrary. Benedict v. Pensacola Motor Sales, Inc., 846 So. 2d 1238 (Fla. 1st DCA 2003); Lane v. Sarfati, 691 So. 2d 5 (Fla. 3d DCA 1997).

The debate amongst the Florida appellate courts should be largely academic because this matter is controlled by the Federal Arbitration Act ("FAA").[4] GLF Constr. Corp. v. Recchi-GLF, 821 So. 2d 372, 373 (Fla. 1st DCA 2002)(FAA controls to the extent Florida law is inconsistent); Lee v. Smith Barney, Harris

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[4] Plaintiffs never disagreed with Raymond James and VandenBerg's assertion that this matter does fall under the FAA. (A9:3)

Upham & Co., 626 So. 2d 969, 970 (Fla. 2d DCA 1993)("We are mindful of the FAA's arguable preeminence over Florida's arbitration code in circumstances where, as here, interstate commerce is involved. . ."). The Second District did recognize the FAA applied, but asserted that because the federal courts conflict on this issue, no binding precedent exists. As a result, the court followed Florida law, and found that under its own precedent, a showing of prejudice was not required.

The Second District's willingness to follow the minority of federal courts is certainly puzzling. The clear majority of federal courts hold that a showing of prejudice is required.[5]

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[5] GLF Constr. Corp. v. Recchi-GLF, 821 So. 2d 372 (Fla. 1st DCA 2002)("For there to be a waiver under the Federal Arbitration Act, federal courts consistently require prejudice to the opposing party"). *See also* Cargill Ferrous Int'l v. Highgate MV, 70 Fed. Appx. 759, 760 (5th Cir. 2003)(prejudice to the party opposing arbitration is determinative of waiver); Ivax Corp. v. B. Braun of Am., 286 F.3d 1309, 1316 (11th Cir. 2002) *citing* S & H Contractors, Inc. v. A.J. Taft Coal Co., 906 F.2d 1507, 1514 (11th Cir. 1990); MicroStrategy, Inc. v. Lauricia, 268 F.3d 244 (4th Cir. 2001) *citing* Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc., 817 F.2d 250, 252 (4th Cir. 1987)("The dispositive question is whether the party objecting to arbitration has suffered actual prejudice."); Leadertex, Inc. v. Morganton Dyeing & Finishing Corp., 67 F.3d 20, 26 (2d Cir. 1995) (explaining that "although [the defendant] did pursue various avenues of discovery [before seeking arbitration], it does not follow that [the plaintiff] was prejudiced"); Stifel, Nicolaus & Co. v. Freeman, 924 F.2d 157, 158-59 (8th Cir. 1991)(agreeing that brokerage firm "acted inconsistently with its right to arbitration by initiating litigation and participating in discovery on arbitrable claims," but reversing waiver determination because the parties opposing arbitration were not prejudiced); J&S Constr. Co. v. Travelers Indem. Co.,

Following this rule, moreover, protects the public policy supporting arbitration as an alternative dispute mechanism. The Second District overcame this authority and public policy goal by noting that Congress enacted the FAA to place arbitration agreements on the same footing as other contracts. Saldukas, 851 So. 2d 857. Those cases that focus upon enforcing arbitration agreements rather than enforcing contracts, the court surmises, focus on the wrong goal. Id.

The inherent defect in the court's reasoning is that the FAA not only reversed judicial hostility to enforcement of arbitration contracts, ***but also created a rule of contract construction favoring arbitration***. Kuehner v. Dickenson & Co., 84 F. 3d 316, 319 (9th Cir. 1996).

> The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself ***or an allegation of waiver,*** delay, or a like defense to arbitrability.

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)(emphasis added). ***See also*** GLF Constr. Corp, 821

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520 F.2d 809, 809-10 (1st Cir. 1975) (affirming district court's conclusion that the defendant did not waive its right to arbitration by answering complaint and participating in discovery because the plaintiff did not establish prejudice).

So. 2d at 374 ***citing*** Morewitz v. The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg), 62 F.3d 1356, 1364 (11th Cir. 1995)("The issue of arbitrability under the United States Arbitration Act is a matter of federal substantive law.").

Because this matter falls under the FAA, this rule of construction applies. Applying this rule of construction as the majority of federal courts have done, the Second District should have arrived at a waiver rule that supports arbitration, not sabotages it.

But even if the Second District failed to follow the majority of federal courts on this issue, under the Florida Code, the same result should occur. Florida courts have consistently followed the rule of construction favoring arbitration. See KFC Nat'l Mgmt. Co. v. Beauregard, 739 So. 2d 630 (Fla. 5th DCA 1999) and citations therein. If the rule for ***construing contracts*** favors arbitration, then Florida courts should logically adopt a rule of ***waiver*** that favors arbitration. Waiver is, after all, nothing more than a defense to enforcement of that contract. It would be odd, indeed, if the rule favoring arbitration was applied to the contract, but not the defense to enforcement of that contract. Requiring prejudice before finding waiver supports arbitration, rather than defeats it.

Those Florida courts that reject the prejudice requirement undermine this policy.

Likewise, at least one judge from the Second District was not necessarily persuaded by the logic behind the rule it followed, but simply recognized the court's duty to follow its its precedent in Donald & Co. Securities, Inc. v. Mid-Florida Community Services, Inc., 620 So. 2d 192, 194 (Fla. 2d DCA 1993). As Judge Canady observed below, there may be little reason to continue to follow this rule. "I am concerned that allowing a party to an arbitration agreement to avoid arbitration due to the adverse party's nonprejudicial conduct may unnecessarily undermine the arbitration process." Id. at 859.[6]

This Court's decision in Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999), supports Judge Canady's laments. As the First District reasoned, Seifert held that

> when ruling on a motion to compel arbitration, the trial court's analysis is the same under both the Federal Arbitration Act (federal Act) or the Florida Arbitration Code (Florida Code).

[6/] Albeit in *dicta*, three other judges of the Second District stated that subsequent developments in decisional law call into question the continued viability of Donald & Co. *See* GE Life & Annuity Assur. Co. v. Vogel, 849 So. 2d 330 (Fla. 2d DCA 2003)(per curiam Altenbernd, C.J., and Salcines and Covington, JJ.)

Benedict, 846 So. 2d at 1241. Donald & Co. was decided before Seifert, thus the Donald & Co. court did not have the benefit of this Court's directions to ensure that state arbitration law coincides with its federal counterpart. The FAA has consistently been interpreted to require a showing of prejudice before an implied waiver of arbitration can be found. The district courts that follow a no-need-to-show-prejudice rule thus position federal and Florida law in direct conflict. This quandary will, in turn, encourage forum shopping and create inconsistent results based upon identical facts. See Oppenheimer & Co. v. Young, 456 So. 2d 1175 (Fla. 1984) *vacated by* 470 U.S. 1078 (1985)(“The adoption of a rule that the state cause of action is subject to arbitration, while the federal cause of action is not, would lead to an uneconomical bifurcation of proceedings.”).

At bottom, Judge Canandy's concerns are well-founded. As demonstrated, neither RJ nor VandenBerg waived the right to arbitrate. Regardless, Plaintiffs made no showing of prejudice. A showing of prejudice should be required where a party is claiming waiver, because the result is to otherwise "unnecessarily undermine the arbitration process."

CONCLUSION

Raymond James did not act inconsistent with its right to arbitrate. It agreed to arbitrate if the party demanding it could provide documents to support its request to arbitrate. Raymond James asked the NYSE to resolve the arbitrability issue, and complied with all requests made by the NYSE. Viewing the totality of the circumstances, and the presumptions favoring arbitration, the Second District's ruling on the facts of this case conflicts with all other district court cases addressing this issue.

This Court should answer the question certified by the Second District to require a party seeking to establish a waiver of the right to arbitration to also prove prejudice. A rule to the contrary undermines the public policy favoring arbitration.

Respectively Submitted,

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2) and is printed in Courier New font.

_____
Hala Sandridge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Christopher T. Vernon, Esquire and Benjamin C. Iseman, Esquire, 3080 Tamiami Trail, E., Naples, FL 34112-5715 and Bruce W. Barnes, Esquire, Bruce W. Barnes, P.A., 5801 Ulmerton Road, Suite 200, Clearwater, FL 33760-3951 on November 3, 2003.

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Hala A. Sandridge, Esquire

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